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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

Docket No. 72-548

EDWARD LEE MICHAEL, JR.,

Petitioner,

vs.

FRANK A. EYMAN, Warden,
Arizona State Prison,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Edward Lee Michael, Jr.
In Propria Persona
Box B-30615
Florence, Arizona

IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD LEE MICHAEL, JR.,

Petitioner,

vs.

FRANK A. EYMAN, Warden,
Arizona State Prison,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Edward Lee Michael, hereby prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on the 7th day of July, 1972.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reprinted herein in Appendix A, infra. This opinion is reported in____ F.2d ____ (USCA 9, June 16th, 1972).

The Magistrate's Recommendation and the Order of the United States District Court for the District of Arizona entered September 17th, 1971, denying petitioner's application for Habeus Corpus relief, is unreported and is reproduced herein in Appendix B, infra.

The order of the Supreme Court of Arizona entered Arpil 2nd, 1971, denying the appeal of petitioner from the judgment and sentence of the Superior Court of Arizona, is reproduced in Appendix C, infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on the 16th day of June, 1972, and Rehearing was denied on the 7th day of July, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Rule 22(3), Rules of the Supreme Court. This petition is timely filed pursuant to 28 U.S.C. Section 2101 (c).

QUESTIONS PRESENTED FOR REVIEW

1) May the state supress the spoken response to the question: "Where is the gun?" on the grounds that the question violated the precepts of Escobedo v. Illinois, and yet use in evidence the gun itself which was immediately thereafter, and in response to the same question, shown to the questioning officer in it's place of concealment?

2) Must the United States District Court hold an Evidenciary Hearing to resolve a material and disputed issue of fact?

STATEMENT OF THE CASE

At 12:12 A.M. on the morning of July 6th, 1965, Scottsdale (Arizona) police received a "shooting victim" telephone call, in response to which Officer Thomas Star arrived at the defendant's residence approximately two minutes later. Officer Star's arrival was immediately after the arrival of an ambulance which had also been summoned to the scene.

Both the police and ambulance had been called by the petitioner's father, who, together with the petitioner's two sons (12 and 15 years old), had been awaken by a gunshot and had rushed into the bedroom shared by petitioner and his wife, where they saw the obviously wounded Mrs. Michael slumped in a chair, and the petitioner, who had also called out for help, in an incoherent state.

While petitioner's father was summoning help, petitioner's son Timothy entered his parents bedroom and was told by his father to unload and put away the gun which was lying on petitioner's bed, next to the chair in which the victim sat. Tim-

othy did not immediately respond to his father's request and the petitioner apparently repeated it, whereupon Timothy took both the .22 caliber pistol which was on the bed and a .45 automatic which was on the floor under the bed, and put them both in a desk drawer on the other side of the room. This was all done before the police and ambulance arrived.

When Officer Star arrived at the Michaels' residence, he was met in the driveway by the petitioner's father, who made statements to him which the Supreme Court of Arizona has since, in State v. Michael, 103 Ariz. 46 (1968), held to be sufficient to focus suspicion on the petitioner under the standards of the United States Supreme Court as set forth in Escobedo v. Illisois. Officer Star then went to the bedroom wherein the petitioner lie prostrate on the bed, in a state of severe emotional turmoil or shock, and stood by while the ambulance attendents removed the victim. During these same few moments petitioner's son Timothy also returned to the bedroom area.

As the petitioner sought to follow

the stretcher bearing his wife out of the bedroom, Officer Star restrained him by the arm and asked him: "Where is the gun?" The question was asked in the presence of Timothy. Petitioner then pointed in the general direction of the desk and replied, "It's over there. It was laying on the bed. I told my son to pick it up and put it away," to the officer, at which time Timothy then added, "Here it is," and pulled open the drawer to expose the gun. (R.T. pages 93, 59-60.)

In the appeal of the first trial in this case, at 103 Ariz. 46, the Arizona Supreme Court determined that Escobedo was violated by the questioning of the petitioner by Officer Star, and the answers by the petitioner to the officer's questions were not admitted into evidence at the second trial. The gun, however, was.

Petitioner was tried for the second time on July 8th, 1969, in the Superior Court of Arizona at Phoenix, Arizona. During the consideration by the Court and counsel of the proposed

jury instructions the defense counsel objected to the proposed instructions on malice aforethought in the following language:

> "This particular third paragraph is equivalent to a comment by the court on the state of the evidence and it is not an accurate statement of the law insofar as this case is concerned." (R.T. Vol. 10, page 2.)

The trial court overruled this objection and then went on to read to the jury the objected to instruction, as follows:

> "Now, Ladies and Gentlemen of the jury, murder is the unlawful killing of a human being with malice aforethought.
>
> Malice may be expressed or implied. It is expressed when there is shown a deliberate intention unlawfully to take the life of a human being. It is implied where no considerable provocation appears, or to show that a homicide has been committed with a deadly weapon, and no circumstances or mitigation, justification or because merely the law implies malice. (Emphasis supplied.)

The jury returned a verdict of guility of second degree murder and on September 11th, 1969, petitioner was sentenced to a term of 10 to 20 years

in the Arizona State Prison.

Direct appeal was taken to the state Supreme Court and the conviction was affirmed on April 2nd, 1971. (This decision was reported at 483 P.2d 541 and is reproduced in the Appendices hereto.)

In the decision by the Arizona Supreme Court affirming the conviction, referance is made by that court to the jury instruction mentioned above, and that court stated that the jury instruction was indeed garbled and an incomplete statement of the law. However that court also stated that when compared to the written version of the instruction contained in the record, it was obvious that the error was in the transmission.

The defense asserts that this written version of the instruction against which the court alleges to have compared the transcribed version does not in fact exist, nor has it ever existed in the record of this case. Affidavits to that effect were filed with the Arizona Supreme Court upon petition for rehearing by two defense

counsel who examined the record in the Clerk's Office in the Arizona Supreme Court both before the filing of the petitioner's opening brief in that court and after the filing of that court's decision in the direct appeal of this case.

On April 28th, 1971, the Supreme Court of Arizona denied the Petition for Rehearing.

On May 20th, 1971, a petition for Writ of Habeus Corpus was filed in the United States District Court for the District of Arizona, pursuant to 28 U.S.C. Section 2254. This Petition for Writ of Habeus Corpus was denied by the District Court by order entered September 17th, 1971, accepting the Commissioner's recommendation without a hearing.

A Certificate of Probable Cause was granted by the District Court on October 20th, 1971, and appeal was taken to the United States Court of Appeals for the Ninth Circuit from the order of the District Court.

The Court of Appeals affirmed the

order of the District Court on June 16th, 1972, and entered it't order denying petitioner's Petition for Rehearing on the 7th day of July, 1972.

From the order of the Court of Appeals for the Ninth Circuit, Petitioner now brings this Petition for Certiorari.

ARGUMENT

A WRIT OF CERTIORARI SHOULD BE ISSUED

I

MAY THE STATE SUPRESS THE SPOKEN RESPONSE TO THE QUESTION: "WHERE IS THE GUN?" ON ESCOBEDO GROUNDS AND YET USE IN EVIDENCE AT TRIAL THE GUN ITSELF, WHICH WAS IMMEDIATELY THEREAFTER, AND IN ANSWER TO THE SAME QUESTION, DISPLAYED TO THE QUESTIONING POLICE IN ITS PLACE OF CONCEALMENT?

It is most difficult to rationally argue this question and yet not obfuscate the fact that the police officer asked the petitioner for the location of the gun; the petitioner replied that "It's over there. *** I told my son to pick it up and put it away," and the son, who was present during this exchange, then opened a drawer and displayed the object of his father's statement to the officer.

In the appeal of the first trial in this case, the Arizona Supreme Court ruled that the very question here involved violated the petitioner's Escobedo rights, and his oral reply was held inadmissible at the second trial.

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However that court has failed in it's consideration of this case to likewise exclude evidence "come at by exploitation of that illegality." Wong Sun v. United States, 371 U.S. 471 at 488, 83 S.Ct. 407, 9 L.Ed.2d 441.

Officer Star testified that prior to the time petitioner indicated the location of the gun he did not know where it was, and that it's location was directly attributable to his questioning of the petitioner:

Q. You asked him (petitioner) where the gun was?

A. Right.

Q. And based on his answer to you, you then found out where it was. Is that true?

A. That is correct. (R.T. p.46-47)

In the courts below much has been said about the non-retraoactivity of Miranda, but the questioning in this case was an Escobedo violation, not a Miranda error.

Much has also been written about the possible agency relationship between father and son in this case, but

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surely if the father cannot validly answer the officer's question free from the precepts of Escobedo, than neither can his inadmissible reply create a valid implied agency for his son to waive the rights which he himself could not, and did not, waive.

This case involves a single incident, in which the officer asked the question, the father answered by pointing out the location of the gun, and the son, who was present for the questioning, immediately responded to his father's answer to the officer by opening the drawer to which his father had pointed so as to disclose the gun to the questioning officer.

This was one brief incident, there was no intervening time, and the question and answer were in violation of Escobedo. It is res judicata that the spoken reply is inadmissible, State v. Michael, 103 Ariz. 46; and it should be mandatory that the gun which was the object and the instant fruit of that reply should be suppressed as well.

II

MUST THE UNITED STATES DISTRICT COURT HOLD AN EVIDENTIARY HEARING TO RESOLVE A MATERIAL AND DISPUTED ISSUE OF FACT?

In it's decision in this case at 107 Ariz. 126 the Supreme Court of the State of Arizona found that the jury instruction complained of in this action was obviously a mistranscription of the printed instruction which was contained in the record on appeal to that court. The petitioner is unable to find such a printed instruction in the record and alledges that it does not in fact exist, thus presenting a clear question of fact. Was there a printed version in the record of which the complained of version is a mistranscription, or is the complained of version the actual version of the instruction which was objected to by the trial counsel?

That the reported version of the instruction is a misstatement of the law is confirmed by the Arizona Supreme Court in the very decision in which that court alleges the existence of a printed version upon which it based it's decision.

State v. Michael, 107 Ariz. 126.

The question of fact as to the existence of a correct printed version in the record, then, clearly exists.

The remaining determination for this court to consider is whether or not the instruction involved, and as given, presents a valid Constitutional question?[1]

This instruction, as given, reads:

> "Now, Ladies and Gentlemen of the jury, murder is the unlawful killing of a human being with malice aforethought.
>
> "Malice may be expressed or implied. It is expressed when there is shown a deliberate intention to take the life of a human being. It is implied where no considerable provocation appears, or to show that a homocide has been committed with a deadly weapon, and no circumstances or mitigation, justification or because merely the law implies malice."

This conviction was for second degree murder; thus establishing that the jury found extant the malice necessary to

---

1 It might also be asked whether the Court's basing of it's decision on a nonexistent record is consistent with 14th Amendment Due Process?

reach a higher crime than manslaughter. Clearly the instruction which told them that "merely the law implies malice" could have played a significant part in the jury's determination of this issue.

Federal courts have begun to accept the Constitutional implications of erroneous jury instructions in recent years when "the error or confusion is so oppressive that it offends the due process." Stump v Bennett, 398 F.2d 111 (1968). See also Johnson v Bennett, 390 U.S. 1002.

> "In the criminal prosecution of one charged with the commission of a felony, the defendant has an absolute right to a jury determination upon all essential elements of the offense. This right, emanating from the criminal defendant's constitutional right to trial by jury, is neither depleted nor diminished by what otherwise might be considered the conclusive or compelling nature of the evidence against him. This right is personal to the defendant, and, like his right to a jury trial, is one which he, and he alone, may waive; furthermore, in a situation wherein an understandingly tendered waiver is not forthcoming from the defendant, under no circumstances may the trial court usurp this right by ruling as a matter of law on an

essential element of the crime charged." United States v England, 347 F.2d 435, 430.

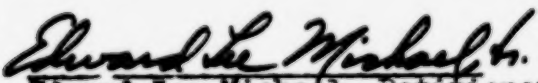
It is petitioners position that an instruction which tells the jury that "the law merely implies malice" is so serious an abrogation of the defendant's constitutional right to trial by jury that the Federal Courts are compelled to hold a Hearing for the purpose of determining whether such an instruction was in fact given as reported, and whether the printed version of that instruction which was said to be in the record by the state court, and whose existence is completely denied by the petitioner, does in fact constitute a part of the record on appeal in this case.

CONCLUSION

For the reasons set forth above the petitioner, EDWARD LEE MICHAEL, respectfully requests that a writ of certiorari be issued to the United States Court of Appeal for the Ninth Circuit.

DATED: September 29th, 1972.

Respectfully submitted,



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Box B-30615
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Assisted by L.A. Fassler

APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD LEE MICHAEL, JR., Appellant,
vs. FRANK A. EYMAN, WARDEN, ARIZONA
STATE PRISON, Appellee. No. 71-2774

(June 16, 1972)

Appeal from the United States District
Court for the District of Arizona

Before: MERRILL, TRASK, and GOODWIN,
Circuit Judges.
PER CURIAM:

An Arizona prisoner serving a sentence for manslaughter appeals a denial of habeas-corpus relief, urging that his state conviction was tainted by "poisoned-tree" evidence and a bad instruction. We affirm.

The instruction, even if it was error under state law, a point which we need not decide, presents no federal constitutional question.

The evidentiary question affords no basis for habeas-corpus relief. The state introduced in evidence two pistols found in a drawer in the prisoner's room at the time of his arrest. The pistols were pointed out in answer to a question by a police officer who had arrived at the scene of the shooting while the prisoner was still somewhat shaken by recent events. He said, "I shot my wife," and, with reference

to the fatal weapon, said, "It's over there."

Both statements were made without the benefit of preinterrogation warnings. While the state court excluded both incriminating statements, it did not deem the physical exhibits fatally tainted by the lack of warnings. See State v. Michael, 103 Ariz. 46, 436 P.2d 595 (1968).

We express no opinion on whether a police officer must give pre-interrogation warnings prior to asking the location of a lethal weapon in the circumstances of this case. It is sufficient to note that the questioning occurred before Miranda v. Arizona, 384 U.S. 436 (1966), was decided, and that Miranda is not, for federal habeas-corpus purposes, retroactive. Jacobson v. People of California, 431 F.2d 1017 (9th Cir. 1970). See Johnson v. New Jersey, 384 U.S. 719 (1966).

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD LEE MICHAEL, JR., Appellant,
vs. FRANK A. EYMAN, WARDEN, ARIZONA
STATE PRISON, Appellee. No. 71-2774

Before: MERRILL, TRASK, and GOODWIN,
Circuit Judges.

ORDER

On page 1 of the slip opinion in the above-entitled case, in the first line of the text, the opinion is corrected to strike the word "manslaughter" and substitute the words "second-degree murder."

The petition for rehearing is denied.

Dated: July 7, 1972

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EDWARD LEE MICHAEL, JR., Petitioner,
vs. FRANK A. EYMAN, WARDEN, ARIZONA
STATE PRISON, Respondent.
CIV 71-278 PHX. RECOMMENDATION.

(September 17, 1971)

TO THE HONORABLE C. A. MUECKE, JUDGE,
UNITED STATES DISTRICT COURT, DISTRICT
OF ARIZONA:

The above entitled matter was referred to the United States Magistrate for review and recommendation pursuant to Rule 80 of the Rules of Practice, United States District Court for the District of Arizona.

Petitioner by retained counsel, John J. Flynn, Esq., seeks relief pursuant to 28 U.S.C. 2254 following his conviction of a charge of second degree murder and sentence of imprisonment of ten to twenty years. He has exhausted his state remedies, State v. Michael, 483 P.2d 541. Counsel for petitioner does not dispute any of the stated facts in the decision except as relate to the alleged giving of an erroneous instruction by the trial court.

Petitioner claims that his constitutional rights were violated by the failure of the trial court to suppress the introduction into evi-

dence of certain weapons and ammunition in the grounds of illegal search and seizure. The material facts relative to this claim are as follows:

> On July 6, 1965, about midnight, Police Officer Thomas Star was dispatched to investigate a shooting at the defendant's residence in Scottsdale, Arizona. The officer arrived shortly after an ambulance, and was met in the driveway by defendant's father who said "my son just shot his wife. I think she's dead". Officer Star was then escorted by defendant's father to a bedroom in the home where the defendant was lying on the bed. The deceased, Florence Michael, was slumped over in a chair with an apparent bullet wound in her cheek. As the body was being removed from the room by ambulance attendants the defendant rose from the bed and started to follow; Officer Star grasped the defendant's right arm and asked "Where is the gun?" defendant responded "I shot my wife. Is she dead? Please help her." Again Officer Star asked where the gun was and the defendant responded "its over there." and pointed to the interior of the bedroom with his arm. The defendant's son Timothy, who had entered the room, then opened the desk drawer and said to the officer, "Here it is." Star looked into the drawer and identified a .22 caliber revolver and

a .45 caliber automatic both enclosed in holsters and then closed the drawer and accompanied the defendant into the living room. Star then assumed a position which would enable him to observe the bedroom and the defendant under arrest.

The search and seizure took place prior to Chimel v California, 395 U.S. 752 relied on by petitioner. The law then controlling was U.S. v Rabinowitz, 339 U.S. 56 standing for the proposition that a warrantless search incident to a lawful arrest may generally extend to an area that is considered to be in the "possession" or under the "control" of the person arrested. Here the officer had knowledge that a shooting had taken place, evidence that the petitioner had done the same, and had therefore every reason, to expect to find a weapon in the immediate vicinity. We also have existing the exigent circumstances called for in Chimel v California Supra. It is further to be noted that Chimel v California Supra has not been applied prospectively. Williams v United States, 418 F2d 159 (9C.A.1969); Jordan v United States, 416 F2d 338(9C.A. 1967); United States v Bennett, 415 F2d 1113(2C.A. 1969); Lyon v United States, 416 F2d 91(5C.A.1969).

Petitioner advances a further theory for suppression on the fruit of the poisoned tree doctrine. He argues that the disclosure of the items followed an admission against interest which was subsequently suppressed as violative of Escobedo v Illinois, 378 U.S. 478. The record reveals that the petitioners son actually disclosed the location of the

gun and ammunition. It is now contended that the son was acting as the agent of the father and that the act of the son was the act of the father. While this is an arguable theory, it is just as plausible to assume the son acted adversely to the father and in his own right as a witness disclosed the location. Burdeau v McDowell, 256 U.S. 465; Coolidge v New Hampshire, U.S. (Decided June 21, 1971). Further, based upon the facts set forth in the opinion as well as the petition, it appears the defendant consented to the search. Manni v United States, 391 F2d 922(1C.A.1968). Based upon the facts and applicable law existing at the time, the evidence was properly admitted.

The other ground set forth is an allegation that an erroneous instruction was given by the court on malice. A copy of the transcript TR Vol. XI, page 176 is attached hereto. The Arizona Supreme Court found this to be an error in transcribing and not the actual instruction given. This was apparently based on a number of reasons. First, the instruction was so patently erroneous that it would have produced an immediate response from both prosecution and defense, a fact which did not happen. Secondly, no objection was made at the close of instructions. The court also noted the absence of an avowal by counsel that the instruction was given as reported. The TR Vol. X, Page 1 and 2 reflects the trial court stated it would give the first three paragraphs of MARJI 251. A copy of the transcript pages and instruction are attached hereto. The court apparently also gave weight to a presumption of regularity that what was indicated would be done, was in fact done

and that the state trial judge knew the law and correctly stated it.

Read in context with all of the instructions and in the absence of objection by counsel this issue does not give rise to a constitutional question. Gomez v Beto, 402 F2d 766, Cert Denied, 349 U.S. 936; McDonald v Sheriff of Palm Beach County, Florida, 422 F2d 839; Poulson v Turner, 359 F2d 588 (10C.A.1966); Linebarger v State of Oklahoma, 404 F2d 1092 (10C.A.1968).

It is felt that little could be accomplished by an evidentiary hearing in this matter. It is my recommendation that counsel be advised the court will consider the matter on the basis of the petition, the reported decision and objection thereto, Trial Transcript Vol. XI, Page 173-185, Vol. X, Page 1 and 2 and copy of MARJI Instruction 251.

Dated this 14th day of July, 1971

/s/ Richard C. Gormley
RICHARD C. GORMLEY
United States
Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EDWARD LEE MICHAEL, JR., Petitioner,
vs. FRANK A. EYMAN, WARDEN, ARIZONA
STATE PRISON, Respondent.
CIV 71-278 PHX. ORDER

(September 16, 1971)

Having studied the petition and the entire file and recommendation of the Magistrate in the above matter, this Court accepts the findings in said recommendation as if set forth in full herein. Therefore,

IT IS ORDERED the petition is denied.

/s/ C. A. Muecke
C. A. Muecke
United States District
Judge

Appendix C

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

STATE OF ARIZONA, Appellee,
v. EDWARD LEE MICHAEL, JR.,
Appellant. No. 2098

April 2, 1971

Appeal from the Superior Court of
Maricopa County. The Honorable
E. D. McBryde, Judge. Judgment
Affirmed

Gary K. Nelson, Attorney General,
Phoenix; Carl Waag, Assistant
Attorney General, Phoenix, Attorneys
for Appellee; John J. Flynn, Phoenix,
Attorney for Appellant

LOCKWOOD, Justice:

This is an appeal by Edward Lee Michael, Jr. from the conviction of murder, second degree, resulting from a retrial after his previous conviction was reversed by this Court. See State v. Michael, 103 Ariz. 46, 436 P.2d 595(1968). Defendant was informed against for murder of an undesignated degree and after his second trial was found guilty by a jury of murder, second degree. He was sentenced from a minimum of ten to a maximum of twenty years in the state prison. From his conviction, denial of motions for

new trial and directed verdict and sentence, he appeals.

The questions presented for review are:

"1. Did the trial court err in failing to suppress evidence obtained as the 'poisonous fruit' of inadmissible, involuntary statements of the appellant?

"2. Was the search and seizure of the weapons and ammunition in violation of the Fourth Amendment because the items seized were not within appellant's immediate control and thus the search and seizure was not incidental to his arrest?

"3. Did the court err in allowing the expert testimony of F.B.I. Agent George Burley based upon his analysis of missing and inadmissible evidence?

"(a) Should an expert witness be allowed to testify as to tests conducted upon tangible evidence not produced at trial?

"(b) Should an expert witness be allowed to testify as to tests conducted upon unlawfully seized evidence?

"4. Did the court err in allowing a neighbor of decedent to give hearsay testimony concerning statements made by the decedent with regard to domestic strife between the latter and appellant?

"5. Did the jury instruction on malice aforethought adequately

inform the jury of the legal requisites of second degree murder?

"6. Did the prosecutor engage in misconduct that improperly influenced the jury?

"7. Is the Fifth Amendment requirement that capital crimes be prosecuted by indictment applicable to the states?"

The reversal of defendant's previous conviction was based on the admission in evidence of certain incriminating statements by the defendant to police officers before he was advised of his right to remain silent and to have counsel, in violation of Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). (Since his first trial occurred before the dicision in Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, its principles were not involved.)

In the present appeal defendant's first two questions challenge the admission in evidence of weapons and ammunition which he contends were the "poisonous fruits" of the oral admissions involved in his first appeal, or in the alternative that such evidence was the product of an unlawful search and seizure.

The facts material to our consideration of these arguments are as follows: On July 6, 1965, about midnight, Police Officer Thomas Star was dispatched to investigate a shooting at the defendant's residence in Scottsdale, Arizona. The Officer arrived shortly after an ambulance, and was met in the driveway by defendant's father who said "my son just shot his wife.

I think she's dead". Officer Star was then escorted by defendant's father to a bedroom in the home where the defendant was lying on the bed. The deceased, Florence Michael, was slumped over in a chair with an apparent bullet wound in her cheek. As the body was being removed from the room by ambulance attendants the defendant arose from the bed and started to follow; Officer Star grasped the defendant's right arm and asked "Where is the gun? (Footnote). defendant responded "I shot my wife. Is she dead?" Please help her." Again Officer Star asked where the

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FOOTNOTE: In his first trial we found that the case had reached the accusatory stage and we said in 103 Ariz. at page 49: "* * * Defendant had started to follow the body as it was being removed from the room, but Star took hold of his arm, stopped him and asked, 'Where is the gun?' In effect this was telling defendant that he (defendant) had knowledge of where the gun was that had been used in killing the deceased, which was asking defendant to furnish evidence which would be used against him at the trial. He had not been advised of his rights. Star had stopped defendant while he was following the attendants who were removing the body of the deceased from the room, evidently for the purpose of eliciting incriminating statements. The question was therefore not just in the investigatory stage, but had begun to focus on defendant as a particular suspect, and had therefore reached the accusatory stage."

gun was and the defendant responded "Its over there." and pointed to the interior of the bedroom with his arm. The defendant's son Timothy, who had entered the room, then opened the desk drawer and said to the officer, "Here it is." Star looked into the drawer and identified a .22 caliber revolver and a .45 caliber automatic both enclosed in holsters and then closed the drawer and accompanied the defendant into the living room. Star then assumed a position which would enable him to observe the bedroom and the defendant. Other officers arrived and placed the defendant under arrest.

The incriminating admissions of the defendant and declarations of his father were not admitted in evidence at the second trial, but are taken from the testimony given at the hearings held before and throughout the trial, on defendant's motion to suppress the physical evidence. Such statements are material to the court's determination of whether circumstances existed which would allow a search to be made without a warrant. We believe that the search was reasonable under exceptions enunciated by the United States Supreme Court. The officer had a right and duty to locate the weapon incident to the safety of himself and other persons present at the scene, as well as the obligation to preserve the evidence connected with the crime, McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153; Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782; Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, A.R.S. Section 13-1415.

In his argument at trial and in this appeal defendant relies upon Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 as supporting his position that the search exceeded the scope permitted by that decision. Chimel, supra, is not applicable to the facts of this case. Further, since we are dealing with a retrial of a case tried before Chimel, the law as it existed prior to that decision, as summarized in Justice White's dissenting opinion is controlling. Chimel has been held not to be retroactive. Williams v. United States, 418 F.2d 159 (9th Cir.); State v. Pustamante, 11 Ariz.App. 129, 462 P.2d 822; State v. Ramos, 11 Ariz.App. 196, 463 P.2d 91. In Chimel, supra, the absence of probable cause was the reason advance judicial approval of the search had not been obtained. No emergency there existed as it did in the instant case. The physical evidence of the deceased, with an evident gunshot wound visible, coupled with the father's statement that his son had just shot his wife furnished probable cause for the officer to expect to find a gun nearby.

The next question is did evidence become tainted by reason of the defendant's inadmissible statements and cooperation in indicating the location of the guns. A similar problem was presented this Court in the retrial of Miranda, supra, and in State v. Miranda, 104 Ariz. 174, 450 P.2d 364. Cert. Denied, 396 U.S. 868 we held:

> "That the 'fruits' doctrine is not a for-the-loss-of-a-nail-a-kingdom-was-lost rule as indicated in Wong Sun v. United States. It seems probable that Wong Sun would not have 'voluntarily' re-

turned to the office of the Narcotics Bureau (83 S.Ct. 411) to make his incriminating statement if he had not been previously made aware of the physical power of the law when he was arrested '* * * without probable cause or reasonable grounds.' 83 S.Ct. 419. Yet, in Wong Sun, the Court found that the confession was sufficiently '* * * "attenuated to dissipate the taint."' 371 U.S. 490, 83 S.Ct. 419.

"It seems to this Court that there is a natural classification of 'fruits' into at least three possible categories. The first would be the situation presented in Wong Sun -- that of a subsequent confession of the accused himself. The second might be tangibles of evidentiary value. The third might be testimony of witnesses who have personal knowledge of the crime. In declining order, there would usually be a decreasing degree of causal connection between the previous invasion of privacy and the existence of the incriminating evidence and its availability to the prosecution."

The specific location of the guns was furnished by the defendant's son Timothy who had placed them in the drawer following the shooting. In his own right as a witness Timothy could disclose the location. However, if we adopt the defendant's theory that Timothy responded to his father's remarks to Officer Star that he was to assist in the search for the

weapon then we can conclude that defendant consented to the search and Timothy was his agent. Prior to the decisions in Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) a preliminary notification of a right was not held to be a condition precedent to a valid waiver of that right and therefore the facts and law would support the proposition that defendant consented to the search and seizure. Manni v. United States, 391 F.2d 922, U.S. Cert. denied, 393 U.S. 873; People v. Lyles, 260 C.A.2d 62, 66 Cal.Rptr. 799; People v. Trant, 85 Ill.App. 157, 228 N.E.2d 535; People v. Smith, 63 C.A.2d 779, 48 Cal.Rptr. 382, 409 P.2d 222. In People v. Smith, supra, the California Supreme Court held that the statements of a defendant were inadmissible because of failure of the police to give warnings required by Escobedo, supra, but the search of the house was held to be lawful by reason of her voluntary consent. The United States Supreme Court referring to the Miranda decision in Schmerber v. California 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 acknowledges a distinction between testimonial evidence and search and seizure under the Fifth Amendment guarantee against self-incrimination. We hold that the evidence was admissible.

Following the arrest of the defendant the murder weapon together with nine cartridges which had been in the cylinder, one of which had been fired leaving an empty casing, the slug which had been removed from the victim and an unknown quantity of extra cartridges which police had obtained in a subsequent search of the defendant's home (without a warrant) were forwarded by the police to the F.B.I.

Crime Center in Washington, D.C. At the trial F.B.I. Agent and Ballistic Expert George Burley testified for the state. Defendant contends that such testimony was based upon inadmissible and missing evidence and should have been excluded from his trial. The spent casing was lost prior to the trial and was not introduced in evidence. A photograph, however, was available to the court. The tests performed by Agent Burley had been conducted with the aid of the missing casing and extra cartridges. The trial court refused to admit the extra cartridges in evidence, as having been seized unlawfully in the subsequent search. The agent's testimony was confined to the missing casing and his experience in general with the characteristics of that ammunition, which was identified by manufacturer's name as well as period of manufacture. Whether to permit an expert witness to testify about physical objects not in evidence is within the sound discretion of the trial court, according to the circumstances existing. Patterson v. Chenowth, 89 Ariz. 183, 360 P.2d 202; State v. Romo, 66 Ariz. 174, 185 P.2d 757. We can find no error to the defendant in admitting this limited testimony.

The missing shell did not create a handicap to the defendant's ballistics expert who testified to the same matters. The reasonableness of the testimony was a question for the jury. This evidence bore upon the question of whether the wound was self-inflicted by the victim in connection with the asserted defense that the death was a suicide and not murder. The significance of the presence or absence of powder burns can best be explained by an expert and not left to speculation by the

jury solely on inference drawn by counsel in closing argument. At the close of the trial the court at defendant's request instructed the jury on missing evidence as follows:

> "If you find that the State has destroyed or lost, or caused to be destroyed or lost, any evidence whose nature, quality or description is an issue, you may infer that the true fact is against the State's interest."

Defendant next contends that the testimony of Annabelle Tomcheck, a neighbor and friend of the deceased who testified relating to statements made by decedent shortly before her death should have been excluded since they were hearsay and inadmissible in the state's case in chief. The prosecution called such witness to establish the "state of mind" of the deceased shortly before her death. Such testimony was not offered for the truth of the statements, but as an exception to hearsay rule. Udall, Arizona Law of Evidence, Section 173 at 353. The witness Tomcheck testified as follows:

> "Q. Mrs. Tomcheck, would you please tell the jury what Flouncy Michael told you on the night of the 4th of July 1965, which was just shortly before she died?
>
> "A. Just what she told me? Can I include my conversation to her?
>
> "Q. Tell the jury what she told you that night.

"A. She told me that she was going to stay at the Michael residence until the youngest, Bruce, was -- he would be out of high school, and she would then get a divorce and go out and start a new life. Her only concern at that time was for the boys.

"Q. Did she state how long a period of time this would be?

"A. Five years."

Defense counsel in his brief maintains such testimony was inadmissible as the deceased's state of mind was not in issue.

We cannot agree with defense counsel that the state of mind of deceased was not in issue in view of the earlier statements on that subject by the defense. In cross-examination of the defendant's father Edward L. Michael, Sr. (a state's witness) the following is shown by the record.

"Q. BY MR. KESSLER: (Defense Counsel) Mr. Michael, when we described her condition, or her conduct as having ups and downs, can you give any specific examples, do you remember any -- observing any experiences, even though they may seem minimal or slight or trivial, which would indicate that she was having moody periods or different types of conduct exhibited?

"A. Yes. One Saturday afternoon -- this I would call it an 'up' -- I heard loud voices

from the back yard, so I entered the house to learn what was going on just as Flouncy addressed somebody in the living room, the boys among others, and saying, 'Your camping trip is off, you can't go.'

"MR. DIETTRICH: I object, hearsay testimony by the witness.

"MR. KESSLER: Well, your Honor, I'm not so much offering this for what was said but rather for a condition, or a state of mind because I think in this particular case, the state of mind of the deceased is in issue just as much as the defendant's. I'm offering it primarily for this purpose, not for what she said, but how she said it, her demeanor and conduct, so I'm offering for the act itself as opposed to the actual words.

"THE COURT: I'll allow it for that purpose."

Defendant having opened the door on the issue of "state of mind" in order to prepare the jury to be receptive to a defense cannot object if the other party offers evidence of like nature on the same subject. Turley v. State, 48 Ariz. 61, 75, 59 P.2d 312, 318; Udall on Evidence, Section 11.

Defendant maintains that the court's instruction on malice was both unintelligible and a misstatement of the law. The reporter's transcript reveals that such instruction as well as defendant's requested instructions No. 7 and No. 8 were in-

complete, garbled statements. When compared to the written version in the record from which the court read it is obvious that the error was in the transcribing. Such statements if in fact made would have brought both attorneys to their feet and interrupted the proceedings. No objection was made following the instructions to the jury, although the court made the customary inquiry as to whether there were any further instructions.

Defendant does not avow that such statements were made by the court, but rather states that since he had previously objected to the court's standard instruction on malice, from that point forward it was no longer necessary to object concerning that instruction. With this we do not agree. A specific objection to an instruction upon one ground does not raise an objection upon some other ground. Rule 51, Rules of Civil Procedure, A.R.S. Musgrave v. Gilhen, 80 Ariz. 188, 294 P.2d 674. In reviewing the proceedings below this Court does not look beyond the record on appeal. Crouch v. Truman, 84 Ariz. 360, 328 P.2d 614. See also State v. Rockerfeller, 9 Ariz.App. 265, 451 P.2d 623, U.S. Cert denied 396 U.S. 920.

Defendant objected to a portion of the court's instruction on malice. Defendant contends that such portion of the instruction is not a correct statement of the law and amounts to a comment on the evidence by the court. Defendant requested instead that the court read to the jury the definition of malice as set forth in A.R.S. Section 13-451. Upon an examination of the entire instruction given we find no error. State v. Mathis, 92 Ariz. 194, 375 P.2d 388; State v. Preis, 89 Ariz. 336, 362

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P.2d 660.

Defendant contends that he was deprived of a fair trial as a result of the various occurrences of misconduct of the prosecutor during the trial. We note that counsel for both the defense and the state represented their positions with zeal. Likewise the court's attention was drawn to any possible improper act by adversary in the form of objections and in the case of the defense, numerous motions for a mistrial, directed verdict and later a new trial. The court heard argument and exercised its discretion and in the absence of an abuse of that discretion this court will not disturb such rulings. The parading between court and chambers and lengthy argument by counsel concerning admissibility of evidence no doubt can be attributed to various changes in the law applicable to admission of evidence which we dealt with previously in this opinion. We do not believe the court abused its discretion in its rulings on the separate alleged "improprieties" of the prosecution, to which defense had raised objection, which in effect was a finding that they were not prejudicial. Early in the development of changes in the law on admissibility of evidence Justice Frankfurter in Nardone v. United States, 308 U.S. 338, made the observation:

> "Dispatch in the trial of criminal causes is essential in bringing crime to book. Therefore, timely steps must be taken to secure judicial determination of claims of illegality on the part of agents of the Government in obtaining

> testimony. To interrupt the course of the trial for such auxiliary inquiries impedes the mementum of the main proceeding and breaks the continuity of the jury's attention. * * * And if such a claim is made after the trial is under way, the judge must likewise be satisfied that the accused could not at an earlier stage have had adequate knowledge to make his claim. The civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited direction entrusted to the judge presiding in federal trials, including a well-established range of judicial discretion, subject to appropriate review on appeal, in ruling upon preliminary questions of fact. * * *"

Defendant's final contention that, the trial upon information and not indictment was a violation of his Fifth Amendment rights was also raised in his first appeal, we have held it to be without merit. State v. Michael, supra, at page 47. State v. Foggy, 101 Ariz. 459, 420 P.2d 934, U.S. Cert. Denied, 87 S.Ct. 1386, 386 U.S. 1025, rehearing denied, 87 S.Ct. 2060, 387 U.S. 938.

We are of the opinion that the defendant was accorded a fair and impartial trial. The judgment of the Superior Court of Maricopa County is affirmed.